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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1041

THE WESTERN PACIFIC RAILROAD COMPANY, and the SOUTHERN PACIFIC COMPANY, suing on their own behalf and on behalf of all other railroads similarly situated, *Petitioners,*

vs.

HOWARD W. HABERMEYER, THOMAS M. HEALY, and A. E. LYON, individually and as members of the Railroad Retirement Board; SAMUEL CHMELL, individually and as Director, Bureau of Unemployment and Sickness Insurance of said Board; DEAN W. STODDARD, individually and as Chief, Division of Claims Operations of said Board; and H. H. DASHIELL, Director, Atlanta Region; JOHN J. FINNERTY, Director, New York Region; FRANK J. SHEA, Director, Cleveland Region; CHARLES L. HOLLER, Director, Chicago Region; RAYMOND W. LUSK, Director, Dallas Region; WILLIAM R. CALWELL, Director, Kansas City Region; WALTER J. MACKLIN, Director, San Francisco Region, each individually and as Directors of said Regions under said Board, *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit in its cases No. 20785 and No. 21377.

OPINIONS BELOW

Petitioners seek review of a decision of the Court of Appeals for the Ninth Circuit upon consolidated appeals from two decisions of the District Court which were rendered in a single action below. The opinion of the Court of Appeals is reported at 382 F.2d 1003 and appears at Appendix A, pp. 1a-11a, *infra*. The opinion of the United States District Court for the Northern District of California in case No. 20785 is reported at 248 F. Supp. 44 and appears at Appendix B, pp. 12a-17a, *infra*. The unreported memorandum decision of the District Court in case No. 21377 (R.V. 4, p. 233)[1] appears at Appendix C, pp. 18a-19a, *infra*.

JURISDICTION

The judgments of the Court of Appeals were entered on August 23, 1967. (Appendices G, H, pp. 34a-35a, *infra*). A timely petition for rehearing was filed on September 21, 1967 and was denied without opinion on October 25, 1967. (R.V.1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Respondents, who are members and officials of the Railroad Retirement Board, chose to pay unemployment benefits totalling more than $2,500,000 to more than three thousand railroad fire-

1. "R.V." references are to the certified transcript of the record in the Court of Appeals which was filed with the Clerk of this Court pursuant to Rule 21, and to the particular volume and (where applicable) page thereof as designated by the Clerk of the Court of Appeals. Volume 1 of the transcript, consisting of proceedings in the Court of Appeals, is not paginated and, with respect to that volume, page numbers cannot be provided.

men who had elected to terminate their employment with the railroads in return for substantial severance allowances. All such unemployment benefits have come from the Railroad Unemployment Insurance Account, a fund maintained entirely by the statutory contributions of railroad employers, including petitioners. Petitioners assert that, in paying the challenged benefits, respondents have violated the express limitations of their governing statute and have failed to follow the procedures which it commands. The Court of Appeals affirmed an award of summary judgment in favor of respondents upon the ground that the statute supposedly prohibits any judicial review of any sort, at the instance of the employers, of the legality of respondents' actions. The questions presented by the decision of the Court of Appeals and by this petition are these:

1. Consistently with Article III of the Constitution and the nature of the Judicial Power, may all judicial control of any sort be prohibited with respect to administrative action which is contrary to statute and in excess of statutory authority?

2. Consistently with Due Process, may all judicial review of any sort be withheld with respect to administrative action which seriously, substantially and adversely affects the property rights of those who seek such review?

3. In view of the foregoing constitutional questions, and in the light of the settled rule that access to judicial review will be denied only upon the most clear and convincing evidence of legislative intent, can it properly be concluded that Congress intended to prohibit all judicial control whatever over the actions of the Board, even when contrary to statute and in excess of jurisdiction?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional Provisions

Article III of the United States Constitution:

> "Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . ."
>
> "Sec. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [or] the Laws of the United States. . . ."

The Fifth Amendment to the United States Constitution:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Statutes

The pertinent provisions of the Railroad Unemployment Insurance Act (Sections 1(k)(l), 4, and 5)[2] are extensive, and are therefore set forth in Appendix D, pp. 20a-29a, *infra*.

The Arbitration Award

The benefits in question have been paid to men who elected to terminate their employment with the railroads pursuant to the terms of the award of a special arbitration board convened pursuant to Congressional direction. Public Law 88-108, 77 Stat. 132 (1963). The pertinent provisions of the arbitration award are set forth in Appendix E, pp. 30a-31a, *infra*.

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2. Section 1(k)(l) can be found at 52 Stat. 1095 (1938), as amended 54 Stat. 1094 (1940), 60 Stat. 736 (1946), or at 45 U.S.C. § 351(k)(l) (1964); Section 4 at 52 Stat. 1098 (1938), as amended 53 Stat. 846 (1939), 54 Stat. 1097, 1098 (1940), 60 Stat. 737, 738 (1946), 65 Stat. 691 (1951), 72 Stat. 1782 (1958), 73 Stat. 31 (1959), 77 Stat. 222 (1963), or at 45 U.S.C. § 354 (1964); Section 5 at 52 Stat. 1099 (1938), as amended 54 Stat. 1098 (1940), 60 Stat. 738 (1946), 62 Stat. 870, 991 (1948), 63 Stat. 107 (1949), 72 Stat. 948 (1958), or at 45 U.S.C. § 355 (1964). The entire Act is found at 45 U.S.C. §§ 351-404 (1964), as amended 45 U.S.C. §§ 351, 352, 356, 358, 360, 361 & 362 (Supp. II 1965-66).

The Carter Memorandum

The benefits were purportedly authorized by a June 5, 1964 memorandum from Mr. H. L. Carter, then Director of Unemployment and Sickness Insurance of the Railroad Retirement Board, to respondent Regional Directors of the Board. The Carter memorandum appears in Appendix F, pp. 32a-33a, *infra*.

STATEMENT

Petitioners and the class they represent constitute some 775 railroads which contribute more than 85% of all amounts paid into the Railroad Unemployment Insurance Account (R.V. 2, pp. 2-3; R.V. 4, p. 188), a fund established under Section 10 of the Railroad Unemployment Insurance Act[3] for the payment of unemployment benefits to railroad employees. Respondents are members and officials of the Railroad Retirement Board, which is charged, under the provisions of the Act, with the determination of eligibility for unemployment benefits and the payment of such benefits to claimants found to be qualified. Sections 2-5.[4] Respondents have been paying unemployment benefits to more than three thousand former railroad firemen who elected, pursuant to the award of a special arbitration panel established by Congress (Appendix E, pp. 30a-31a, *infra*), to terminate their employment with the railroads in return for substantial severance allowances (R.V. 2, pp. 15-16). Petitioners seek, in this action, to review the legality of respondents' actions. Petitioners assert that, in paying the challenged benefits, respondents have disregarded, as irrelevant, the express limitations upon eligibility for benefits which are set forth in the Act (Section 4(a-2))[5] and have failed to follow the express

3. 45 U.S.C. § 360 (1964), as amended 45 U.S.C. § 360 (Supp. II 1965-66).

4. 45 U.S.C. §§ 352-355 (1964), as amended 45 U.S.C. § 352 (Supp. II 1965-66).

5. 45 U.S.C. § 354(a)(2) (1964)

statutory requirement (Sections 4(a-2), 5(b))[6] that the Board make findings concerning the applicability of such provisions with respect to all claimants for benefits. (R.V. 2, pp. 16-17). Petitioners seek declaratory and injunctive relief. (R.V. 2, pp. 27-30).

The District Court's jurisdiction was invoked under Sections 1331(a) and 1337 of 28 U.S. Code. (R.V. 2, p. 4).

The Railroad Unemployment Insurance Account

Under the terms of the Act, all contributions to the Railroad Unemployment Insurance Account are made by employers such as petitioners, and none are made by their employees. Section 8.[7] Petitioners have an obvious and substantial interest in preventing unlawful disbursements from the Account. Petitioners' contribution rates are intended to vary in accordance with the balance standing in the Account (Section 8), and it is they and the other employers who must, of necessity, replace any amounts which are disbursed from it. Since 1950, the balance standing in the Account has diminished from a surplus of approximately $780,000,000 to a deficit of approximately $250,000,000[8] while the employers' maximum rate of contribution has increased, by degrees, from an original rate of ½ of 1% to a present all-time high of 4%. Section 8(a); 20 C.F.R. § 345.2(a) (1967).

The Elections Made Pursuant to the Award and the Subsequent Applications for Benefits

The arbitration award provided for the elimination of a portion of the firemen positions on non-steam freight and yard engine crews, subject to certain described rights which were afforded

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6. 45 U.S.C. §§ 354(a)(2) & 355(b) (1964).

7. 45 U.S.C. § 358 (1964), as amended 45 U.S.C. § 358 (Supp. II 1965-66).

8. *Railway Express Agency, Inc. v. Kennedy,* 189 F.2d 801, 805 (7th Cir. 1951), *cert. denied,* 342 U.S. 830 (1951); Railroad Retirement Board, *The Monthly Review,* Vol. 27, No. 10 (Oct. 1966).

to men affected by such changes. (R.V. 2, pp. 31g, 31i-k). The rights of the men presently involved are set forth in paragraph C(6) of the Award. (Appendix E, pp. 30a-31a, *infra*). These "C(6) firemen" were to retain all of their rights to engine service assignments unless and until

> "offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become qualified."

The offer of the "comparable job" was to include relocation expenses, accumulated seniority rights for purposes of vacations and other fringe benefits, and guaranteed annual earnings for a period of five years. If any man rejected a comparable job, the award provided that he should "[f]orfeit all of his employment and seniority rights and relations" and receive, in lieu thereof, a severance allowance based upon recent earnings. (Appendix E, pp. 30a-31a, *infra*). With respect to the average C(6) firemen, the severance allowance came to something in excess of $5,600. (R.V. 2, p. 9).

Subsequent to the issuance of the Award, more than 3200 of the C(6) firemen chose to terminate their employment with the railroads and they received, collectively, in excess of $17,000,000 as severance allowances. (R.V. 4, p. 190; R.V. 2, p. 9). Most of these men had been offered, and had rejected, comparable jobs under the terms of the Award; but some had resigned even before comparable jobs had become available or their existing assignments had been affected by the Award. (R.V. 2, p. 16). Following their receipt of the severance allowances, the majority of the C(6) firemen—more than 3,000 of them, in fact—applied for and received unemployment benefits paid by respondents from the Account. (R.V. 2, pp. 10-12, 16-18, 20-21). Such benefits have come to more than $2,500,000. (R.V. 2, p. 18; R.V. 4, pp. 199-200, 228).

The Statutory Provisions Relating to Eligibility

The Railroad Unemployment Insurance Act contains express "Disqualifying Conditions" relating to men, such as the C(6) firemen, who are unemployed through their own choice, and it requires findings by the Board concerning the applicability of those conditions with respect to all claimants for benefits. (Sections 4, 5(b)). The critical language concerning disqualification is found in Section 4(a-2) (Appendix D, pp. 21a-23a, *infra*), which provides in relevant part:

> "(a-2) There shall not be considered as a day of unemployment, with respect to any employee—
>
> "(i) (A) subject to the provisions of subdivision (B) hereof, *any of the days in the period beginning with the day with respect to which the Board finds that he left work voluntarily,* and continuing until he has been paid compensation of not less than $750 with respect to time after the beginning of such period;
>
> "(B) *if the Board finds that he left work voluntarily with good cause, the provisions of subdivision (A) shall not apply . . . .*
>
> "(ii) *any of the thirty days beginning with the day with respect to which the Board finds that he failed, without good cause, to accept suitable work available on such day and offered to him,* or to comply with instructions from the Board requiring him to apply for suitable work or to report, in person or by mail as the Board may require, to an employment office." (Emphasis added.)

Thus, under the terms of the Act, a man is disqualified to receive benefits if the Board finds that "he left work voluntarily," unless it also finds that he "left work voluntarily with good cause." And even if there is a finding that a man left work voluntarily, but with good cause, he is nevertheless disqualified for a 30 day period if the Board finds that "he failed, without good cause, to accept suitable work available . . . and offered to him." As is

implicit in the language of Section 4(a-2), the Board has the duty, in each case, of determining the eligibility of an applicant for benefits as a condition of the payment of such benefits to him. Section 5(b) of the Act eliminates any possible doubt concerning the matter:[9]

> "The Board is *authorized and directed* to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits." (Appendix D, p. 24a, *infra*). (Emphasis added).

The Actions of Respondents

It is admitted that respondents made no effort whatever to determine, upon the basis of the individual circumstances, whether all or any of the C(6) firemen were disqualified for benefits—that is to say, whether, in a given case, the decision to terminate employment with the railroad was made "with good cause," whether the particular comparable job which was offered constituted "suitable work" and, if so, whether it was rejected "without good cause." (R.V. 2, pp. 10-12, 16-17, 91-92; R.V. 4, pp. 199-200).

Instead, and on June 5, 1964, Mr. H. L. Carter—an employee and not a member of the Board—issued a memorandum to respondent Regional Directors which purported to dispense with the problem. (R.V. 2, pp. 31w-x; Appendix F. pp. 32a-33a, *infra*). The memorandum concluded, without discussion or analysis, that

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9. The Court of Appeals found it "unnecessary to decide whether, as the Board contends, Section 355(b) [Section 5(b) of the Act] authorizes but does not require findings . . ." in connection with applications for benefits (Appendix A, p. 6a, note 4); but the question is no longer open for decision. In *Shields v. Utah Idaho Central R.R. Co.*, 305 U.S. 177, 179, 182 (1938), this Court construed identical language contained in the Railway Labor Act and held that where, as in Section 5(b) of the present statute, an agency was "authorized and directed" to take certain described actions, those actions were mandatory. Indeed, the point seems obvious.

neither the choice of separation from railroad service, nor the rejection of the comparable job, nor the acceptance of the severance allowance could have any effect whatever upon the eligibility of any of the C(6) firemen for unemployment benefits. Upon receipt of this memorandum, and without themselves exploring the eligibility of any of the respective claimants, respondent Regional Directors commenced the payment of the challenged benefits. (R.V. 2, p. 18; R.V. 4, pp. 199-200, 228).[10]

The Proceedings Below

The railroads objected promptly and repeatedly to the Board's refusal to follow the statute. (R.V. 2, pp. 18-19). When such objections proved unavailing, petitioners commenced the present action in the United States District Court for the Northern District of California. (R.V. 2, pp. 1-31a-i).

Petitioners moved for preliminary injunctive relief (R.V. 2, p. 37; R.V. 4, p. 203), and respondents moved to dismiss, or, alternatively, for summary judgment. (R.V. 4, p. 156). The District Court denied injunctive relief and granted respondents' motion for summary judgment. The District Court did not undertake to decide whether respondents had acted in accordance with the statute. Instead, the court concluded, upon jurisdictional and pro-

10. The Court of Appeals appears to have misconceived the whole thrust of petitioners' argument, believing petitioners to contend that the Board must make specific, formal findings on a "claim-by-claim basis," even when blanket findings might properly apply to a large class of applicants. (Appendix A, pp. 4a-6a, *infra*). On the contrary, however, and as petitioners have said repeatedly in their briefs, they contend no more than this: that where, as here, the circumstances of the individual claimants are, in fact, dispositive of eligibility, the Board *must* explore those individual circumstances. (Opening Brief, pp. 20-21; Reply Brief, pp. 2-3; Petition for Rehearing, p. 2). This is not to say that, even in the present case, blanket findings on some issues might not have been proper—as for example that, subject to the limitations of Subsections 4(c-d), jobs offered as firemen or as engineers would constitute suitable work and jobs as, say, janitors might not. Though distinctions such as these lie at the heart of the letter and spirit of the statute, the Carter memorandum purported to make them irrelevant.

cedural grounds, that this action could not be maintained by petitioners.[11] (Appendices B, C, pp. 12a-19a, *infra*).

Timely appeals were taken by petitioners from the orders and judgment of the District Court (R.V. 2, p. 148; R.V. 4, p. 255) and were consolidated for hearing in the Court of Appeals. The Court of Appeals affirmed upon the ground that, in its view, Section 5 of the Railroad Unemployment Insurance Act (Appendix D, pp. 23a-29a, *infra*) expressly prohibits judicial review, at the instance of the employers, of decisions of the Board granting claims for benefits. (Appendix A, pp. 6a-11a, *infra*).[12] The Court of Appeals did not discuss—or even mention—the constitutional difficulties which were obviously presented by such an interpretation of the statute.[13]

Petitioners filed a timely petition for a rehearing en banc, requesting that the Court of Appeals at least confront directly the constitutional implications of its decision. The petition was denied without opinion on October 25, 1967. (R.V. 1).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is based squarely upon the conclusion that the statute expressly forbids any judicial review whatever by petitioners of the actions of the Board.[14] It is important to be quite clear concerning what, in present circum-

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11. Though its opinions are not entirely clear upon the matter, the District Court apparently concluded that the Board's actions were ones involving "discretion" and therefore not subject to review; that petitioners had no standing to sue; and that the statute precluded review.

12. The meaning and effect of Section 5 with respect to judicial review are considered in Part III of petitioners' argument concerning Reasons for Granting the Writ.

13. The constitutional problems had earlier been brought to the attention of the Court of Appeals by way of petitioners' opening brief. (pp. 55-56).

14. The Court of Appeals did not discuss, and presumably rejected, the ragbag of makeweight arguments put forward by respondents below as

stances, this decision necessarily means. Petitioners do not merely charge that the Board has made a mistake; it is rather their contention that the Board has failed to heed the express limitations of its governing statute and the procedures which it commands. Petitioners' opportunity for judicial review has not simply been delayed until a later time, or merely restricted in scope; if the decision below stands, the railroads can never be heard before

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to why petitioners were supposedly not entitled to a hearing on the merits. (see, *e.g.*, R.V. 2, pp. 97, 111-130; R.V. 4, pp. 156-57).

There was good reason for rejecting such suggestions. Thus, the proposition that an action such as this, for a declaration that Federal officers have acted in excess of their authority, constitutes an unconsented suit against the United States was recently characterized by Judge Friendly as "surprising" and drew from him the following admonition:

> "[L]aw officers of the Government ought not to take the time of busy judges or of opposing parties by advancing an argument so plainly foreclosed by Supreme Court decisions." *Toilet Goods Association v. Gardner*, 360 F.2d 677, 683 and note 6 (2d Cir. 1966), *affirmed*, 387 U.S. 158, 167 (1967).

Respondents' argument that the C(6) firemen are indispensable parties ignores the fact that all that petitioners ask is that the Board be compelled to follow the procedures commanded by the statute. Plainly, the firemen are not indispensable to such a proceeding. See *Reich v. Webb*, 336 F.2d 153 (9th Cir. 1964), *cert. denied*, 380 U.S. 915 (1965). Moreover, since there is no court in which jurisdiction over all of the firemen could be obtained, a conclusion of indispensability would necessarily deny petitioners any relief whatever, in contravention of the decisions of this Court (*e.g.*, *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65 (1936)) and the provisions of FRCP Rule 19(b).

Respondents' insistence that the doctrine of limited review of acts of administrative discretion precludes the Federal courts from interpreting an act of Congress and from determining whether Federal officials have exceeded their statutory powers is answered by numerous decisions of this Court, of which *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), is perhaps the most closely in point, and of which *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), is the most recent.

Respondents' contention that the railroads, who almost alone contribute to the Account, have no standing to challenge its unlawful waste is based upon a false analogy to *Massachusetts v. Melon*, 262 U.S. 447 (1923), which held that general federal taxpayers had no standing to challenge expenditures of the general federal revenues because their interests were "minute and indeterminable." (262 U.S. at 487). That rule is obviously inapplicable where, as here, petitioners are members of a small and definite class who contribute to a specific fund earmarked for a definite purpose. The decision of this Court in *Stark v. Wickard*, 321 U.S. 288 (1944) is directly in point.

any court at any time or place concerning the waste by the Board of millions from a fund to which they, almost alone, contribute. Moreover, if petitioners cannot seek judicial control of the actions of the Board, neither can anyone else; and the decision of the Court of Appeals therefore means that no court, anywhere, can ever restrain the Board from defying the statute creating its power to act.

Petitioners submit that such a wholesale denial of judicial review is contrary to Article III of the Constitution and to the Due Process clause of the Fifth Amendment and that it conflicts with numerous decisions of this Court which have interpreted and applied those constitutional provisions. Only action by this Court now can prevent a major dilution of the Judicial Power and the final obliteration of a constitutional right.

In interpreting the statute to prohibit all review—an interpretation which clearly was not compelled by the language of the Act—the Court of Appeals necessarily raised, and even decided, these constitutional questions; yet it reached its conclusion without even acknowledging that the constitutional questions existed. Plainly, therefore, the Court of Appeals could not have heeded the decisions of this Court which warn against interpreting statutes in ways creating doubts concerning their constitutionality. Neither could it have followed the numerous decisions of this Court which uniformly refuse to attribute to Congress an intent to prohibit judicial restraint of administrative acts in excess of statutory power. Such departures from the accepted and usual course of judicial proceedings call for the exercise of this Court's power of supervision.

I

In denying all judicial control whatever of actions of Government officials proceeding in excess of their statutory authority, the decision of the Court of Appeals conflicts with Article III of the

Constitution and with the rationale and necessary implications of numerous decisions of this Court.

There is, of course, no doubt that Congress may submit questions of law and fact, otherwise judicially cognizable, for executive or administrative decision and that, with some exceptions, it may restrict the scope of review of such decisions, or defer review until a later stage of the proceedings. What Congress cannot do, consistently with the Constitution, is to make the administrator the final arbiter of the limits of his own statutory powers; for that is a judicial function vested in the courts by Article III, which can be obliterated by neither the executive nor the legislative branches of the Government.

That this is so has been implicit since the earliest decisions of this Court. Consider *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), where the Court, in discussing Marbury's right to his commission, observed that Madison was "amenable to the laws for his conduct" (5 U.S. at 166), and that, since the whole of the Judicial Power of the United States was vested by Article III in the Federal courts, and since that power extended to all cases arising under the laws of the United States, the Constitution required that jurisdiction "in some form" should exist over the controversy. (5 U.S. at 173-174). To be sure, there was, in *Marbury v. Madison,* no question as to the effect of an attempt by Congress to limit the Judicial Power; but the rationale of the decision, based squarely upon Article III, hardly admits of such an exception. The argument was further advanced in *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304 (1816), where Justice Story, speaking for the Court, reasoned that, pursuant to Article III, the *whole* of the Judicial Power must be vested by Congress in *some* Federal court; any other construction "might defeat the constitution itself." (14 U.S. at 329-30).

Though subsequent decisions of this Court have upheld statutory restrictions upon the scope, the extent and the timing of judicial review of administrative action, petitioners are aware of

no occasion upon which this Court has approved a legislative prohibition of all review whatever of administrative action in excess of statutory power. On the contrary, a number of decisions of the Court strongly imply that such a prohibition would offend Article III. Thus, in *Stark v. Wickard,* 321 U.S. 288 (1944), the Court observed that the powers of agencies were "circumscribed by the authority granted," that the "responsibility of determining the limits of statutory grants of authority in such instances is a judicial function" (321 U.S. at 309-10) and that litigation to determine such matters could be maintained "in the ordinary courts in the absence of some exclusive alternative remedy." (321 U.S. at 290). *Accord, United States v. ICC,* 337 U.S. 426, 433-34 (1949); see also *Bowles v. Willingham,* 321 U.S. 503, 511-12 (1944).

In *Crowell v. Benson,* 285 U.S. 22 (1932), the Court approved the submission of matters of ordinary fact and of law for administrative determination, but remarked that "reservation of full authority to the courts to deal with matters of law provides for the appropriate exercise of the judicial function" and that the activities of administrative agencies would relieve the court "of a most serious burden while preserving their complete authority to ensure the proper application of the law." (285 U.S. at 54)[15] Consider also *Schilling v. Rogers,* 363 U.S. 666 (1960), where the Court, in holding that judicial review of a particular administrative decision was prohibited by the statute, noted, by way of explanation

> "This is not a case in which it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope

15. As Professor Jaffee has observed, this statement "would seem fairly to support the doctrine that though an administrative agency may be empowered to adjudicate, the validity of its determinations in point of law must be open to judicial scrutiny." Jaffe, *Judicial Control of Administrative Action,* at 382 (Little, Brown and Company, 1965).

> of his powers, where the availability of judicial review would be attended by quite different considerations than those controlling here." (363 U.S. at 676-77).

The rationale of such cases is strongly supported by numerous decisions of this Court which strike down unauthorized administrative actions despite the assumption that, had they been within the scope of the statute, the actions would have been final. Thus, in *School of Magnetic Healing v. McAnnulty,* 187 U.S. 94 (1902), the Court conceded the "conclusive" character of the determination by the Postmaster General of all questions of fact, but held his decisions to be reviewable where he had "exercised jurisdiction in a case not covered by the statutes." (187 U.S. at 107-08). In *Estep v. United States,* 327 U.S. 114 (1946), the statute provided that the agency's decision should be "final." After noting that, in some circumstances, "judicial review may indeed be required by the Constitution" (327 U.S. at 120), the Court held that the statutory provision for finality would not be given the effect of precluding review of jurisdictional questions. (327 U.S. at 122-23). *Accord, Harmon v. Brucker,* 355 U.S. 579 (1958) (discussed in detail at pp. 20-21, *infra*).

The heart of the matter is this: as to agency action which is in excess of statutory power, the function of the courts is not that of judicial review, but, rather, of judicial control. See *Leedom v. Kyne,* 358 U.S. 184, 188 (1958), where this Court so held:

> "This suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act."

Petitioners submit that the power and the duty of the courts to keep the administrator within the bounds of the statute are created and safeguarded by Article III of the Constitution and that, even if Congress wished to do so, it would be without power to abolish them.

II

The denial by the Court of Appeals of any judicial review whatever, at any time or place, clearly deprives appellants of Due Process of Law.

This is not a case where judicial review has merely been deferred or restricted in scope. It is a case where, unless this Court acts, appellants cannot be heard before any court at any time. Yet, where, as here, serious and substantial interests are affected adversely by administrative action, a right to judicial review *at some time* is compelled by the Constitution. The most recent formulation of the rule was that of Mr. Justice Fortas (joined by the Chief Justice and Mr. Justice Clark) in his dissent in *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967), and the related cases:

> "[F]undamental principles of our jurisprudence insist that there must be some type of effective judicial review of final, substantive agency action which seriously affects personal or property rights." (387 U.S. at 177).[16]

As the authorities adduced by Justice Fortas demonstrate, the doctrine which he declared was firmly rooted in earlier decisions of this Court. The concurring opinion of Mr. Justice Brandeis in *St. Joseph Stockyards Co. v. United States,* 298 U.S. 38, 84 (1936), is perhaps the most celebrated statement of the rule; but there are others. See, for example, *Phillips v. Commissioner,* 283 U.S. 589, 596-97 (1931), and *Ewing v. Mytinger & Casselberry,* 339 U.S. 594, 599 (1950), two majority opinions in which this Court recognized that Due Process required a judicial hearing at some stage of the proceedings, but found, upon the facts and statutes there involved, that the proper time had not yet come. *Accord, Bowles*

16. Though the Justices were dissenting, in part, from decisions of the majority, there is nothing in the majority opinions to suggest disagreement upon this point. On the contrary, the difference between the majority and dissenting Justices was not over whether the Constitution required judicial review at some time, but rather over the stage in the proceedings at which Congress had intended that such review should take place. See 387 U.S. at 177 and note 2; 184 and note 11; 185; 188 and note 14.

v. Willingham, 321 U.S. 503, 520-21 (1944); *Yakus v. United States,* 321 U.S. 414, 442-44 (1944). For petitioners, of course, there is no time but now.

There is at least one decision of this Court holding squarely what the other decisions say and necessarily imply: *Chicago, Milwaukee & St. Paul Rwy. Co. v. Minnesota,* 134 U.S. 418 (1890). The Supreme Court of Minnesota had held that, under applicable Minnesota statutes, rates established by the Minnesota Railroad Commission were conclusive and not subject to judicial review. This Court held that, so construed, the statute conflicted with the Constitution of the United States by depriving the railroads of the right to an ultimate judicial investigation guaranteed by Due Process of Law. (134 U.S. at 456-57). So is it with petitioners.

To be sure, there are cases which say, and sometimes hold, that, consistently with the Constitution, judicial review may be withheld by Congress in particular circumstances; but it is the circumstances which account for the decisions. Thus, judicial review may usually be withheld at one stage of the proceedings if it may be had at a later time. See, *e.g., Ewing v. Mytinger & Casselberry,* 339 U.S. 594 (1950). Again, when what is involved is not affirmative Government action, of which the citizen feels the bite, but rather a failure by the Government to grant to him a benefit, judicial review may sometimes be withheld altogether, if evidence of Congressional intent seems clear enough. See, *e.g., Dismuke v. United States,* 297 U.S. 167 (1936).[17]

Professor Davis reconciles the cases by arranging them upon a scale running from benefit to burden, and concludes that

> "not a single case upholding unreviewability is an entirely satisfactory authority in support of the idea that due process permits denial of review of questions of law, procedure and

17. Such a case also is *Switchmen's Union v. Board,* 320 U.S. 297 (1943), where the right of the union to representation was dealt with as a Governmental benefit as to which judicial review might constitutionally be withheld. (320 U.S. at 297). *But see Leedom v. Kyne,* 358 U.S. 184 (1958).

substantial evidence when the party seeking review is resisting enforcement of a legal obligation." 4 Davis, *Administrative Law Treatise,* Section 28.19, at 106.

Professor Jaffee agrees,[18] and so do the cases. There is no doubt that petitioners fall at the "burden" end of the scale, or that, in the rather more direct language of Mr. Justice Fortas, the conduct of respondents "seriously affects [petitioners'] property rights." (387 U.S. at 177). After all, what petitioners challenge is the unlawful waste by respondents of millions from a fund to which the railroads, almost alone, are compelled by statute to contribute. Due Process of Law requires that, at some time or place, petitioners be afforded a hearing before a court. The last possible occasion for such a hearing is here and now.

III

In construing the statute to prohibit all judicial review whatever of the Board's decisions, the Court of Appeals contravened two fundamental rules of statutory construction which have been repeatedly emphasized and applied by this Court. The first is that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Panama Railroad Co. v. Johnson,* 264 U.S. 375, 390 (1924). The second is that the court will interpret a statute as restricting access to judicial review only upon a showing of the most "clear and convincing evidence" of such a legislative intent (*Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-41 (1967)), and that, where as here, review is sought of acts in excess of agency power, such an intent cannot and will not be attributed to Congress (*United States v. ICC,* 337 U.S. 426, 434 (1948)).

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18. Jaffee, *Judicial Control of Administrative Action,* at 386-87 (Little, Brown and Company, 1965).

The constitutional implications of the decision of the Court of Appeals have already been considered. It is sufficient, for present purposes, to observe that they are, without doubt, both serious and substantial. It can hardly be suggested that the Court of Appeals gave sufficient attention to the constitutional difficulties which were engendered by its decision; for they were not even mentioned anywhere in the opinion.

Neither did the Court of Appeals follow the numerous decisions of this Court which unanimously refuse to find an intent to prohibit judicial control over agency actions which, like that of the Board, are "in excess of . . . . delegated powers and contrary to a specific prohibition in the Act." *Leedom v. Kyne,* 358 U.S. 184, 188 (1958); *Harmon v. Brucker,* 355 U.S. 579 (1958); *United States v. ICC,* 337 U.S. 426, 434 (1948); *Estep v. United States,* 327 U.S. 114 (1946); *Stark v. Wickard,* 321 U.S. 288, 309-10 (1944).

Harmon v. Brucker is particularly illustrative. The statutes there provided that the administrative determination should be "*final,* subject only to review by the Secretary of the Army" (355 U.S. at 581) and "final and conclusive . . . except when procured by means of fraud." (355 U.S. at 585). This Court, in a *per curiam* decision, expressly took note of these provisions and of the Secretary's argument that they deprived the Federal courts of jurisdiction to review his findings. The Court, however, concluded that such provisions could have no effect if the Secretary had in fact "acted in excess of the powers granted him by Congress," for in such circumstances, "judicial review from this illegality would be available." (355 U.S. at 581-82). The Court went on to hold that the actions of the Secretary could not be sustained under the statute.

Harmon v. Brucker admits of only two possible interpretations. Either the Court concluded, as petitioners have argued, that judicial restraints may not constitutionally be withheld with respect to

administrative actions which are in excess of statutory power; or it ruled that an intent to preclude judicial control over such actions would not be attributed to Congress whatever the statute might otherwise provide with respect to actions fairly within the limits of the powers granted.[19] In either event, the decision compels the conclusion that the Court of Appeals was wrong in assuming that the Railroad Unemployment Insurance Act prohibits review of the actions of respondents.

An examination of the statute itself strongly reinforces that conclusion. The only provisions of the Act which relate to judicial review are found in Section 5, which provides a particular procedure for administrative and judicial review in particular and selected circumstances not presently applicable. Thus, where an employee is *denied* a claim for benefits (or where an employer denies the fact of employment), the Act provides in Subsection 5(c) for an administrative appeal, and in Subsection 5(f) for judicial review in the Courts of Appeals. But nothing specific is said concerning review proceedings, either administrative or judicial, where as, here, claims for benefits have been *granted*. Of course, the fact that some administrative decisions are expressly made reviewable in a particular fashion neither compels nor suggests the conclusion that Congress intended to prohibit review of other actions as to which no review is expressly provided. This Court so held most recently in *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967).

The Court of Appeals conceded that there "might be merit" in petitioners' argument that Subsections 5(c) and 5(f) did not affect their right to judicial review, but went on to conclude that Subsection 5(g) of the Act expressly prohibited such review

19. A different situation might, of course, be presented if a statute *expressly* prohibited judicial review even of actions in excess of the powers granted to the agency. The statute in *Harmon v. Brucker* did not contain such a prohibition and neither does Section 5 of the Railroad Unemployment Insurance Act.

(Appendix A, p. 11a, *infra*).[20] Subsection 5(g) provides, in relevant part:

> "Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, *the determination of any other matter pursuant to subsection (c) of this section,* and [determinations concerning availability of funds] shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes . . . and shall not be subject to review in any manner other than that set forth in subsection (f) of this section." (Emphasis added). (Appendix D, p. 28a, *infra*).

The most that can be said for the position of the Court of Appeals is that the emphasized language contains an ambiguity—one which may, however, be resolved upon analysis. Either "pursuant to subsection (c)" modifies both "claim for benefits" and "any other matter," as the word "other" suggests, or it modifies only "any other matter," with the word "other" being superfluous. If the former interpretation is given, so that all words in the statute may be accorded meaning, then Subsection 5(g) refers only to claims which are *denied,* and are therefore appealable under Subsection 5(c), and not to claims which are *allowed,* with which Subsection 5(c) has nothing to do.

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20. The Court of Appeals relied, in this connection, upon *Railway Express Agency, Inc. v. Kennedy,* 189 F.2d 801 (7th Cir. 1951), *cert. denied,* 342 U.S. 830 (1951), which construed the same statute. Though the Court in *Kennedy* did conclude that Section 5 of the Act precluded review of the Board actions there in issue, the *Kennedy* decision affords but slender support for the present one. For one thing, the Court in *Kennedy* apparently thought that, since the statute expressly provided for judicial review of some Board actions, it impliedly prohibited review of all others. (189 F.2d at 804). *Abbott Laboratories v. Gardner,* however, is directly to the contrary. Moreover, in *Kennedy,* both the District Court (95 F.Supp. at 788) and the Court of Appeals clearly assumed that the Board had in fact performed its statutory duty to make findings relating to eligibility, and there was, therefore, no question concerning what intention should be attributed to Congress with respect to actions contrary to the procedures required by the statute.

The former interpretation is wholly consistent with the rest of Section 5, while that of the Court of Appeals is not. In Subsections 5(c) and 5(f), Congress has plainly established a special system for determining the issues specified in Subsection 5(c). Congress created no constitutional difficulties by making that special system exclusive as to matters to which it relates; the system expressly provides for judicial review in Subsection 5(f). It seems quite probable that Congress enacted Subsection 5(g) simply for the purpose of continuing and completing the scheme provided in Subsections 5(c) and 5(f)—rather than for the purpose of frustrating judicial review of other matters not included within that special system. Indeed, unless Subsection (g) is so construed, it is apparent that all of its provisions cannot be read in *pari materia;* for finality under Subsection (g) is expressly made subject to the judicial review provided in Subsection (f), which relates *only* to matters determinable under Subsection (c). How can Board actions which are *not* reviewable under Subsection (f) be made final subject *only* to review under Subsection (f)?

Thus, upon consideration of the statute as a whole, the ambiguity which misled the Court of Appeals disappears. Yet, even if the statute could be interpreted literally in more than one way, the construction chosen by the Court of Appeals still could not be supported; for the decisions of this Court would then require the choice of that construction which would leave intact the right to judicial review and would avoid the grave doubts concerning the constitutionality of the statute which otherwise would necessarily arise.

Moreover, the Court of Appeals failed to note that, however Subsection (g) is construed, and whatever bearing it might have upon review of Board actions in other circumstances, it still could not affect review of the matters presently in issue. For, in giving finality to "findings" and to "conclusions," under Subsection (g), Congress obviously could have intended to bestow its blessings only upon such findings and conclusions as were in fact made by the Board—and not upon the Board's failure to

make the findings and conclusions which the statute required. Yet, in the present case, it is the very absence of the statutory findings of which appellants complain. The subsection, therefore, is necessarily inapplicable.[21]

Finally, the Court of Appeals failed to give adequate attention to the nature of the actions of which petitioners complain. Petitioners' charge is that respondents have contravened the express limitations of the statute and refused to follow the procedures which it commands. The decisions of this Court make it unmistakably clear than an intention to prohibit judicial restraint of such actions will not be attributed to Congress, whatever Congress might be thought to have intended with respect to other acts fairly within the powers granted to the administrator. Indeed, *Harmon v. Brucker* is directly in point, as are *Leedom v. Kyne, United States v. ICC,* and *Stark v. Wickard.* See also *Siegel v. United States,* 87 F. Supp. 555 (E.D.N.Y. 1949), where the argument is developed at somewhat greater length.

In short, the statute does not compel the construction which the Court of Appeals has put upon it, and the decisions of this Court do not permit it.

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21. Respondents have argued, and the Court of Appeals may have believed (Appendix A, pp. 5a-6a, *infra*) that the filing of the claims and their certification for payment pursuant to the directions in the Carter memorandum might, perhaps, constitute the findings required by the statute. Such certifications might, indeed, have constituted findings as to some matters—as, for example, that the claims in question had been filed by C(6) firemen. But they obviously could not have constituted the findings required by Section 4(a-2) upon those matters which the Carter memorandum expressly made immaterial: whether leaving of work was "with good cause"; whether the comparable jobs constituted "suitable work"; and whether such work was rejected "without good cause." It is undisputed that, upon these subjects, no findings were ever made. It is, of course, settled that when an agency is required by statute to make findings upon several matters, findings as to less than all such matters cannot support the agency's determination. See *Yonkers v. United States,* 320 U.S. 685 (1944); *Wichita R.R. v. PUC,* 260 U.S. 48 (1922).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Appendices Follow)